



N 10/658,863

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant:	Mark L. Yoseloff, et al.	Examiner:	Benjamin H. Layno
Serial No.	10/658,863	Group Art Unit:	3711
Filed:	September 9, 2003	Docket No.	PA0906.ap.US
Title:	BET WITHDRAWAL GAME WITH CARD POKER SIDE BET		

MAIL STOP: APPEAL BRIEF - PATENTS

P.O. BOX 1450

Commissioner for Patents

Alexandria, VA22313-1450

REPLY BRIEF ON APPEAL

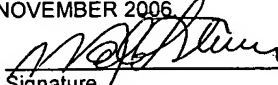
Sir:

Enclosed are three copies of this Reply Brief On Appeal, filed in response to the new issues raised in the Examiner's Answer mailed 1 September 2006. Appellant requests personal appearance before the Board and is hereby authorizing payment of the fee after receiving the Examiner's Answer in accordance with 37 CFR 1.41.

The U.S. Patent and Trademark Office is hereby authorized to debit any costs and fees associated with this Petition to Deposit Account No. 50-1391.

CERTIFICATE UNDER 37 C.F.R. 1.8: The undersigned hereby certifies that this Transmittal Letter and the paper, as described herein, are being deposited in the United States Postal Service, as first class mail, with sufficient postage, in an envelope addressed to: MAIL STOP: APPEAL BRIEF - PATENTS, P.O. BOX 1450, Commissioner for Patents, Alexandria, VA 22313-1450. 13 NOVEMBER 2006

Mark A. Litman
Name


Signature

NEW ISSUE RAISED IN EXAMINER'S ANSWER

There is one new issue, raised for the first time, in the Examiner's Answer mailed on 11 September 2006. As the decision on this new issue is potentially determinative of the outcome of the entire Appeal, this issue requires specific consideration in advance of the decision of Appeal and consideration by the Examiner.

The New Issue

The Examiner's Answer attempts to refute the claim for priority by defining the term "community card" in a manner such that a community card cannot be a wild card and such that what is interpreted by the Examiner as the disclosure of a Community Card that happens to be a Wild Card by applications in the priority chain cannot establish priority under 35 USC 120 for the limitations in the present claims of "community cards." The new strategy of the issue is to ignore the art cited by Appellants that specifically implies if not states that some community cards can be wild cards, and ignores the history of poker games and the use of community cards that may be wild cards.

The imposition of a definition in the Examiner's Answer that contravenes common usage and the language in the priority document is an error in fact and in law.

Response to the New Issue

It is first to be noted that, just as Applicants must rely on the common and art-accepted meaning of terms used in claims, or rely on specific definitions provided in the specification that are consistent with the common definitions of terms, the U.S. Patent and Trademark Office must also allow words to be defined according to those standards and cannot redefine terms or exclude meaning from terms for a matter of convenience, **without objective evidence and reasoning for the usage of terms.** The reasons given in the Examiner's Answer are contrary to the known and accepted meaning in the gaming art, and there is no basis for the asserted interpretation except for the self-serving reasoning given in the rejection.

A review of the already cited prior art, additional patent literature, and the use of the terms in the specifications from which priority is claimed are important.

Community cards are defined consistently in the art as card(s) common to every player at the table. The type, nature and use of that card are not fundamental to whether or not it is a community card. Cards can be community cards whether or not they are discarded, or whether or not the community card(s) themselves or other cards in the deck are wild cards. To show that this is common knowledge to one skilled in the art, Applicant has already cited the following knowledge in the public domain:

- 1) *Ainslie's Complete Hoyle*, Ton Ainslie, Fireside Book, Simon & Schuster, New York, 1975, pp. 268-269; and
- 2) www.Pogo.com, online wagering at Club Pogo, Texas Hold'Em, Jokers Wild.

The first reference (Ainslie) is self-explanatory. It shows that in at least one commonly known poker game, Wild Widow, a single center card (as in Let It Ride® poker taught in the 08/504,023 application) is a wild card for every player, to be used in combination, as the individual players desire, with the other cards dealt to the players. Ainslie therefore shows that a single center wild card is known in the art to be used as a community card.

The Club Pogo site, which has been in place for at least 6 years, provides an on-line game room in which Texas Hold'Em poker and its variants are played. As is well known, Texas Hold'Em is played with each player receiving two Hole Cards (individual pocket cards) and in staged events, five community cards. A variant of Texas Hold'Em provided on Club Pogo's site is a game called Jokers Wild. In that game, the standard 52-card deck is replaced with a 54-card deck having exactly two Jokers. Each Joker is wild. When one or more Jokers appears in the flop, 4th street or the River Card (i.e., in any position in the community cards), each player uses each Joker in a manner to make the player's hand the highest possible rank. The Flop (the first three cards), the 4th Street (4th card) and the River Card (5th card) constitute the totality of community cards used in the game. Again, this establishes that the general knowledge in the gaming art understands and accepts the use of a Wild card in a community card set and that the community card (whether wild or not) may be used by each player in any way that individual player wants to make the player's hand the best possible rank, independent of the suit or rank that Wild card is assigned by any other player. The use of the Wild card in the community card set consisting of the Flop, 4th Street and the River Card clearly

establishes that the Wild card is recognized in the gaming art as an acceptable community card.

U.S. Patent No. 6,299,170 (Yoseloff et al.) further teaches a method of playing a live casino card game with a video display of a wild card with dealing of a number of physical playing cards to a player to form an original hand. From a separate virtual deck of playing cards, at least one card is dealt that is a video display card. At any time during play of the game, showing the value of the at least one card that is a video display card, the at least one card that is a video display card establishes a fact that physical cards of a predetermined relationship to the at least one card that is a video display card are Wild Cards for the purpose of establishing a rank or value for the player's hand. The player is then paid for attaining a hand of at least a predetermined rank or having a hand with a value higher than the value of a dealer's hand; the rank or value being determined with or without the presence of Wild Cards. Yoseloff et al. further states that the method can be practiced by dealing each player his or her own wild card, or by dealing a common or "community" wild card to multiple players participating in a round of play. Preferably, the wild card does not become part of the player's hand. It preferably serves as only an indicator of which cards in the master set of cards are considered wild during that hand. This reference clearly states that community cards may be wild cards.

Similarly, U.S. Patents Nos. 5,901,958 (Andrews); 5,752,702 (McDoniel); 6,042,118 (Poitra) and 6,132,311 (Williams) show community card games with wild cards that may be used in the card sets. None of the references exclude the wild card from being the community card.

Other references show the use of both community cards and wild cards and do not make any specific exclusionary rule with respect to wild cards being the community card. U.S. Patent No. 5,799,945 (Boylan et al.) discloses a method of playing a poker-type wagering game whereby, in each round of play, a plurality of outcomes for each respective player to wager against a dealer are available or offered. These outcomes are: (a) that the player has a two card hand of the same suit; (b) that the player has a two card hand which ranks higher than a dealer's two card hand; and (c) that the player has a poker hand with a poker value of greater than a predetermined value, the poker hand being comprised of two card hand of the respective player, the two card hand of the dealer, and

a common card. After making an ante bet by each respective player against the dealer for a selected one, or preferably at least two, of the plurality of outcomes, the dealer deals two cards to each respective player and himself and a single card which is designated as the common card. In turn, the dealer then first determines whether each betting player has a respective hand of two cards of the same suit and pays off winning hands. Next, the dealer determines whether a betting player has a respective two card hand which ranks higher than the two card hand of the dealer and pays off winning hands. Finally, the dealer determines whether a betting player has a five card poker hand which has a poker value higher than the predetermined value and pays off winning bets. Wild cards may be generally used in the deck, and no distinction is made with respect to the appearance of the wild card in a hand or as the community card.

It is clear that the teaching of a wild card in U.S. Patent Application No. 08/504,023 does not cause a failure in the stream of priority as asserted by the Final Office Action. To that end, as clearly indicated below, the claim for priority has been shown to meet the requirements of 35 USC 112, first and second paragraphs with regard to the single ground of objection proposed in the Final Office Action. With the following described priority chain being satisfactory, deKeller is not available as a reference, even if it provided an effective teaching against the claims, which it does not, as clearly shown above.

It therefore asserted that the deKeller reference is not available under 35 USC 102(b) as a reference in view of the priority date chain established for the present application. In this regard, the Examiner is requested to review the Table below showing priority for the concepts in the limitations in the claims from the earliest application in the priority chain, which application antedates the filing date of the de Keller reference.

RECITATION OF CLAIM 1	PRIORITY LANGUAGE IN PATENT NO. 5,685,774
A method of playing a wagering game, comprising:	"Card-type games provide at least one player with the option of wagering against either a predetermined payout schedule, a dealer's hand, or both." (Abstract)
Placing a first multiple part wager to participate in a first poker-type game;	"(a) determining whether to place a first bet that the player's hand will be greater than a first predetermined rank, where a plurality

	<p>of hands are ranked according to predetermined rules and the first bet is a fixed payout bet;" (Claim 1) "A method of playing a card game according to claim 23 wherein said card deck is a conventional card deck comprising at least fifty-two cards, and each hand comprises four cards and each player combines said wild card indicia with four indicia of playing cards to form a five card poker hand." (Claim 24)</p>
<p>Optionally placing a side bet wager to participate in a second poker-type game played against a pay table;</p>	<p>"(a) determining whether to place a first bet that the player's hand will be greater than a first predetermined rank, where a plurality of hands are ranked according to predetermined rules and the first bet is a fixed payout bet;" (Claim 1) and "(b) determining whether to place a second bet that the player's hand will beat the dealer;" (Claim 1)</p>
<p>Dealing a partial hand for the first poker-type game consisting of multiple cards to each player who placed a first wager, the partial hand for the first poker-type game being a complete hand for the second poker-type game;</p>	<p>"The card of FIGS. 4-6 has a dual function; in playing the game it is used as a wild card; subsequently the card can be taken away by the player and retained as a memento and also serves as a promotional item. In a three-card version of the game described above, a player may be provided with two standard cards and a wild card to form a three-card hand. Alternatively, at least one player may be provided with three cards and be permitted to discard one card in order to form his/her best three-card hand using the wild card. Similarly, in four and five-card versions of the game a wild card of the kind shown in FIGS. 4-6 may be issued to each player and to the dealer. The players and dealer then use the wild card repeatedly in conjunction with each four card hand dealt to them to make a five-card poker hand. In a five-card game each player and the dealer may substitute the wild card for any card in their hand to improve the five-card hand they hold. This has the result of creating higher hand values and adding excitement to the game. According to each of these embodiments, the dealer is also preferably provided with</p>

	the same number of standard cards and a wild card as provided to each player.” The additional card indicates that the original hand is only a partial hand.
Providing community cards to complete partial hands in the first poker-type game; and	“According to each of these embodiments, the dealer is also preferably provided with the same number of standard cards and a wild card as provided to each player.” The single wild card to all players is a community card.
Resolving each player's multiple part wager according to the rules of the first poker-type game and resolving the second poker-type wager according to a predetermined hierarchy of poker hands in a pay table.	“if the dealer's hand does not exceed the second predetermined rank, the bank paying each player an amount based on the second bet and returning the third bet to the player, or if the dealer's hand exceeds the second predetermined rank, comparing the dealer's hand in turn with that of each other player who placed the second bet and if the player's hand is higher, the banker paying the player an amount based on both the second and third bets, and if the player's hand is lower, the player forfeiting both the second and third bets to the banker; and (g) the banker paying the fixed payout bet in accordance with a predetermined scale to any player who placed the first bet and whose hand exceeds the first predetermined rank.” (Claim 1)

As can be seen, the concept of Claim 1 of the present application finds antecedent basis in parent application 08/504,023 and issued patent U.S. Patent No. 5,685,774 issued November 11, 1997, **but filed on July 19, 1995**. That filing date provides a date prior in time to the available reference date of the de Keller reference, which is that patent’s filing date of **September 11, 1995**. The deKeller reference is therefore not available as a reference under 35 USC 102(b) as it is not prior to the established priority date of the present application and claims.

Note that the original specification of this Application as filed stated and claimed priority as:

“This application is a continuation-in-part of U.S. Patent Application Serial No. 10/016,436, filed April 29, 2002, titled Player Banked Three Card Poker and Associated

Games, which in turn is a continuation-in-part of U.S. Patent Application Serial No. 09/249,118 filed February 2, 1999 which in turn is a continuation-in-part of U.S. Patent Application Serial No. 09/170,092 filed October 13, 1998, now U.S. Patent No. 6,237,916 issued May 29, 2001, which is a continuation-in-part of U.S. Patent Application Serial No. 08/889,919 filed July 10, 1997 now U.S. Patent No. 6,056,641 issued May 2, 2000, which is a division of U.S. Patent Application Serial No. 08/504,023 filed July 19, 1995, now U.S. Patent No. 5,685,774 issued November 11, 1997.”

This priority date is established and is effective in overcoming the deKeller reference.

In the claimed priority Patent, (US 6,454,266 – Breeding) it is specifically stated that in yet another example of the invention, one additional wild card (a joker) is added to a standard 52-card deck. In the game of Joker's Wild Let it Ride™. Bonus poker, the player places three equal bets, and an optional bonus bet, on a typical layout as shown in FIG. 4. The dealer deals each player three cards, face down, and two cards to himself, face down. Players are permitted to view their cards. Based on the partial information about the hand, the player is allowed to withdraw a first portion of the bet. The dealer then reveals one of his down cards, and that card becomes a community card common to all hands. The player then has the chance to withdraw another portion of his or her bet based on the four-card hand. The fifth card is revealed, and the hands are resolved. If the player has the joker in either his hand or as a common card, he may designate that card to be any card in a standard deck. For example, if the player holds three Aces and a "community" joker card, the hand is scored as a four of a kind. An exemplary pay table for the Joker's Wild Let it Ride™ Bonus game is shown below:

Jokers Wild Let it Ride™ Bonus Hand	Basic Payout	Bonus	Natural Royal
1,000 20,000 Wild Royal	50 2,000	5 of a Kind	20 1,000
Straight Flush	8 500	4 of a Kind	6 100
Full House	5 50	Flush	4 30
Straight	2 20	3 of a Kind	2 5
2 Pair	2 1	Pair of Queens or better	1 0
Hit Frequency	23.55%	10.4%	House Advantage
2.73%	19.5%		

It is clear that a wild card is available (to enable a 5-of-a-kind hand), and that as with the collection of prior art cited in the analysis above, there is no restriction or exclusion of the wild card as a community card. The artificial distinction and artificial definition asserted in the Examiner's Answer is in error and must be withdrawn. Priority through

the earlier patent must be granted and the deKeller patent is therefore not available under 35 USC 102 as a reference against the claims on Appeal.

CONCLUSION

All rejections of record have been shown in detail to be in error. The rejection should be reversed and all claims should be indicated as allowable. In this Reply Brief, the clear availability of priority for the claims prior to the available reference date of the deKeller reference has been established.

Applicants believe the claims are in condition for allowance and request reconsideration of the application and allowance of the claims. The Examiner is invited to telephone the below-signed attorney at 952-832-9090 to discuss any questions that may remain with respect to the present application.

Respectfully submitted,
MARK L. YOSELOFF, et al.

By their Representatives,
MARK A. LITMAN & ASSOCIATES, P.A.
York Business Center, Suite 205
3209 West 76th Street
Edina, MN 55435
(952)832.9090

Date 13 NOVEMBER 2006

By

Mark A. Litman
Reg. No. 26,390

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to Box: APPEAL BRIEF - PATENTS, P.O. BOX 1450; Commissioner for Patents, Alexandria, VA 22313-1450 on NOVEMBER 13, 2006.

Name: Mark A. Litman

Signature